

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

**UNITED STATES OF AMERICA,**

**CASE NO. 8:04CR328**

**Plaintiff,**

**v.**

**MEMORANDUM  
AND ORDER**

**JOHN ARMENDARIZ,**

**Defendant.**

This matter is before the Court on the Motion for Issuance of a Certificate of Appealability filed by the Defendant, John Armendariz (Filing No. 173), in connection with his Notice of Appeal (Filing No. 169). The Defendant appeals from the Memorandum and Order (Filing No. 166) and Judgment (Filing No. 167) in which the court denied his Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (“§ 2255 motion”). Also before the Court is the Defendant’s Motion to Proceed In Forma Pauperis (“IFP”) on appeal (Filing No 171), and the Defendant’s Request for Transcript. (Filing No. 170).

Before the Defendant may appeal the denial of his § 2255 motion, a “Certificate of Appealability” must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right.

“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The defendant must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In contrast, if the district court denies a § 2255 motion on procedural grounds without reaching the underlying constitutional claims on the merits, a certificate of appealability should issue

under 28 U.S.C. § 2253(c) when the defendant “shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

For the reasons set forth in the Memorandum and Order denying the Defendant’s § 2255 motion (Filing No. 166), the Court concludes that the Defendant has not made a substantial showing of the denial of a constitutional right and has not shown that this Court’s order was debatable or incorrect. Accordingly, a certificate of appealability is denied. However, Federal Rule of Appellate Procedure 22(b) permits the Defendant to request a certificate of appealability from the Court of Appeals, which will review this Court’s decision.

IT IS ORDERED:

1. The Defendant’s Motion for a Certificate of Appealability (Filing No. 173) is denied;
2. That the Defendant’s Motion to Proceed In Forma Pauperis on appeal (Filing No. 171) is denied as moot;
3. The Defendant’s Request for Transcript (Filing No. 170) is denied as moot; and
4. The Clerk of this Court shall process this matter to the Eighth Circuit Court of Appeals.

DATED this 26<sup>th</sup> day of April, 2007.

BY THE COURT:

s/Laurie Smith Camp  
United States District Judge